IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

J. T. SMITH, *Petitioner*,

v.

THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT.

Certiorari is sought to review an opinion (R. 127) (Not yet appearing in the official Oklahoma reports, but appearing in 112 P. (2d) at page 158) of the Supreme Court of Oklahoma, wherein the court affirmed a decree (R. 113) of the District Court of Creek County, Oklahoma, entered upon findings of fact and conclusions of law (R. 108). The Federal question was raised as an additional ground for granting a petition for rehearing (R. 132 and 135) in the Supreme Court. Rehearing was denied (R. 138) without any statement. The jurisdiction of this Honorable Court is invoked upon the grounds set forth in the petition for certiorari, *supra* P. 4. The facts in the petition for the writ, P. 2, are set forth in the various pleadings and are

not complicated nor controverted. Briefly stated, the instant case involves the important question of the construction of the laws of the State of Oklahoma and whether each litigant is entitled to the equal protection thereof, or whether the court may construe the same to mean one thing for certain litigants and another thing for this petitioner. The petitioner had no reason to anticipate that the Supreme Court would deny to him the equal protection of the settled law of the state prior to the filing of the opinion in the instant case, or that it, by making no reference thereto, would evade the settled applicable law, all of which, when considered with uncontroverted facts, appear on the face of the opinion.

SPECIFICATIONS OF ERROR.

The judicial errors complained of in the proceeding are as follows:

I.

The Supreme Court of Oklahoma having in its prior decisions, which have never been overruled or modified, announced the following propositions as settled law of said state, to-wit:

(a) That upon a personal judgment being rendered on a promissory note, whether in the State of Oklahoma or in a foreign state, the cause of action is merged in the judgment and the cause of action on the note no longer exists, but is wholly extinguished;

(b) That under and by virtue of subdivision 4 of Section 101 O. S. 1931, an action based upon a foreign judgment (R. 62-65) to recover a personal judgment thereon in the State of Oklahoma constitutes a new and independent cause of action;

(c) That by uniform decisions the Supreme Court of Oklahoma has adjudged that Section 256 O. S. 1931 means that a supplemental petition (R. 32) must be in

aid of the cause of action set forth in the original petition;

(d) That a pleading complete within itself, without reference to any former pleading stating a cause of action on a foreign judgment, states a new and independent cause of action, and cannot be prosecuted by supplemental petition in an action on a promissory note, but, on the contrary, must be filed as a new and independent cause of action;

erred under facts not distinguishable in not applying said principles of law in the instant case.

II.

The Supreme Court of Oklahoma, without overruling or modifying the settled law of Oklahoma as above set forth, erred in denying to petitioner the equal protection thereof, by evading such settled law and refusing to apply the same to petitioner under applicable facts not controverted, thereby holding in effect that the law means one thing for some persons and another for petitioner.

ARGUMENT AND AUTHORITIES.

(A)—The Cause of Action Upon the Promissory Note Pending in the District Court of Creek County Was Wholly Extinguished and Terminated Upon Judgment Being Rendered on Said Note in the Kansas Court.

The fact that the original suit in the District Court of Creek County was to recover upon promissory note, and the note was reduced to judgment in the State of Kansas is reflected in the opinion by the following language (R. 127):

"This is an appeal from Creek County * * * the plaintiff brought suit for the balance due on a note given by the defendant, secured by real estate mortgages * * * At about the same time a similar suit was filed in Kansas in which the defendant entered his

appearance, and judgment was rendered against him and for foreclosure * * * ."

The above facts being conceded, it follows that under the decisions of said state, to-wit:

Cressler v. *Brown,* 79 Okl. 170. 192 P. 417;
Black v. *Russell,* 130 Okl. 180, 266 P. 448;
Brink v. *Bartlett,* 146 Okl. 111, 294 P. 106;
United States v. *Leffler,* 11 Pet. (U. S.) 86;

the cause of action on the promissory note pending in Creek County, Oklahoma, upon judgment being rendered in the Kansas court upon said note, was wholly extinguished.

In *Black* v. *Russell, supra,* the court quoted from *Olson* v. *Dahl,* 99 Minn. 433, 109 N. W. 1001, as follows:

> "It is elementary that cause of action is merged in a judgment, and upon the entry of the judgment the same becomes changed in form and its original character wholly extinguished. The rule is stated in United States v. Leffler, 11 Pet. (U. S.) 86, 9 L. Ed. 642, as follows:
>
> > 'If there be one question of law settled beyond all questions, it is this: That whenever a cause of action in the language of the law, transit in rem judicatus (becomes a matter adjudged) and the judgment remains in full force and unreversed, the original cause of action is merged and gone forever.'
>
> "Such is the rule in all the courts, so far as our examination of the authorities have extended. The original cause of action loses its identity and character and is changed and transferred into another cause of action, a judgment, and it can no longer be made the basis of another action."

In *Brink* v. *Bartlett, supra,* it is stated:

> "It is well settled that: 'If rights between litigants are once established by the final judgment of a court of competent jurisdiction those rights must be recognized in every way, and wherever the judgment is entitled to respect, by those who are bound by it'. Kes-

sler v. Eldred, 206 U. S. 285, 27 S. Ct. 611, 613, 51 L. Ed. 1065. It has been ruled that, 'where two actions between the same parties, involving the same cause of action, proceed at the same time in courts of concurrent jurisdiction, it is not the final judgment in the action first brought, but the first final judgment, although it may be in the action last brought, that renders the issues res adjudicata in both actions.' McDougal v. Black Panther Oil & Gas Co. (C. C. A.) 273 F. 113, 116; Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 37 S. Ct. 506, 61 L. Ed. 1149, 34 C. J. 886."

In *Cressler* v. *Brown, supra,* it is said:

"The cause of action thus being merged in the former judgment, the parties and their privies are precluded in a subsequent suit, involving the same cause of action from availing themselves of any point of law or fact, * * * the cause of action is destroyed in its entirety. It is ended and terminated, irrespective of the facts or legal propositions considered by the court rendering the judgment."

The above decisions have never been overruled or modified in any manner and they stand today as the law of Oklahoma.

It follows that if a cause of action is wholy extinguished and terminated, there remains nothing to do except dismiss the same.

(B)—A Cause of Action on a Foreign Judgment Constitutes a Separate and Independent Cause of Action.

A cause of action upon a judgment is not an action on contract is the settled law in Oklahoma and announced in *Wakeman* v. *Peters,* 52 Okl. 639, 152 P. 455, as follows:

"But an action on a judgment is not an action on a contract, express or implied, within the meaning of these words as used in the Statute. In Morely v. Lake Shore Railway Company, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 92, in passing on the question whether a judgment is a contract, the court says:

> 'The most important elements of a contract are wanting. There is no aggregatio mentium. The defendant has not voluntarily assented or promised to pay. "A judgment is in no sense a contract or agreement between the parties." ' "

Nor is such an action governed and controlled by the same Statute, 101 O. S. 1931, relating to limitation of actions, which, reads, in part as follows:

> "Civil actions, other than for the recovery of real estate, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> "First: Within five years: An action upon any contract, agreement or promise in writing.
>
> * * * * *
>
> "Fourth: Within one year: An action on a foreign judgment; * * *."

The Supreme Court of Oklahoma in construing said Section of the Statute, in *Miller* v. *National Surety Company*, 159 Okl. 76, 14 P. (2d) 228, held that a suit to recover money upon a written instrument was governed and controlled by Subdivision 1 as being an action upon a contract. In *Gardner* v. *Autry*, 170 Okl. 526, 40 Pac. (2d) 1042, the court held, a cause of action upon a judgment being rendered in another state is controlled by Subdivision 4 of the above section of the Statute and begins to run on the date of rendition of said judgment.

The cause of action upon a foreign judgment is established by copy of said judgment authenticated in the manner prescribed by Section 905, Revised Statute (28 U. S. C. A. Sec. 687).

The above decisions and statute conclusively establish, when applied to the uncontroverted facts in the instant case, that when respondent obtained a judgment in the District Court of Chautauqua County, Kansas, his cause of action pending in the District Court of Creek County, Oklahoma, on the note was wholly extinguished and terminated,

and his cause of action based upon a foreign judgment constituted a separate and distinct cause of action, governed and controlled by different principles of law.

The above decisions have become the settled law of the state and have never been overruled or modified in any respect.

The method by which the Oklahoma courts acquire jurisdiction of the subject matter of an action is defined by Section 164 O. S. 1931, which reads as follows:

> "A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon."

It follows under the settled law of Oklahoma, as announced in the above decisions, that the filing of a supplemental petition in the District Court of Creek county, in an action on a promissory note over the objection of the defendant, conferred upon the court no jurisdiction over a cause of action based on a foreign judgment.

(C)—A Cause of Action Complete Within Itself, Stating a Cause of Action on a Foreign Judgment Cannot Be Prosecuted by Supplemental Petition to an Action on a Promissory Note Within General Law, Nor Section 256 O. S. 1931 as Construed by Oklahoma Courts.

It is a fundamental principle of law generally recognized by the courts, including Oklahoma, *State ex Rel. Morrison* v. *City of Muskogee,* 70 Okl. 19, 172 P. 796, that the character of the pleading is determined by the substance thereof rather than by the title. The pleading under consideration in the instant case (R. 32) is a pleading complete within itself without reference to any former pleading, and alleges a state of facts sufficient to state a cause of action on a foreign judgment.

The controlling question before the Supreme Court of Oklahoma was whether a pleading stating an independent

action upon a foreign judgment could form the basis of a supplemental petition, within the meaning of Section 256 O. S. 1931, on general law, to an action on a promissory note. That such procedure is not authorized under general law is stated in 49 C. J. 571 as follows:

> "supplemental bill or complaint must be consistent with, and in aid of the cause of action set forth in the original complaint; and a new and independent cause of action cannot be set up by such complaint or petition, although it may have arisen out of the same contract that formed the basis of the suit."

The general law is further stated in 21 C. J. 543:

> "If new matters have arisen on which a decree might be rendered without reference to the matters contained in the original, a supplemental bill is improper. Plaintiff should dismiss the original and file a new suit."

It is plain that under general law the court, over the objection of the defendant, acquires no jurisdiction of an action upon a foreign judgment by incorporating said cause of action in a pleading and denominating the same a supplemental petition to an action on a promissory note.

The Statutes of Oklahoma, section 256 O. S. 1931, which reads as follows:

> "Either party may be allowed, on notice, and on such terms, as to costs, as the court may prescribe, to file a supplemental petition, answer or reply, alleging facts material to the case, occurring after the former petition, answer or reply.",

as construed by Supreme Court of Oklahoma, does not change or modify the general law, but is in strict harmony with the spirit and letter of general law.

The construction of a similar statute was first announced by the Court of Appeals of Indian Territory in *Cassidy* v. *McFadden*, 3 Ind. Territory 543, 104 S. W. 829, in an action wherein the plaintiff had filed suit on account and pending

suit, judgment was taken on account in another state. Plaintiff then sought to prosecute an action on the foreign judgment by supplemental petition filed in the action on account. The court in that case quoted the Indian Territory statute, which is similar to the Oklahoma statute, and stated as follows:

> "Section 5080 provides for supplemental pleadings by the parties alleging facts occuring after the filing of the former petition; held, that in a suit on an open account the complaint could not be amended setting up a judgment obtained in another state of the same cause of action."

In *Wynnewood Cotton Oil Co.* v. *Moore,* 54 Okl. 163, 153 P. 633, the court had under consideration both the Indian Territory statute and the Oklahoma statute relating to supplemental pleading and held that they were "practically the same."

In *National Bank of Anadarko* v. *First National Bank,* 39 Okl. 225, 134 P. 866, the court again construed said section of that statute relating to the filing of supplemental pleadings and in the second syllabus of said case announced the law to be as follows:

> "The facts embodied in a supplemental petition under the Code must relate to the same cause of action set forth in the original petition and must be in aid thereof. It is not proper to bring into a cause by supplemental petition new facts which have arisen since the action was commenced and which by themselves, if they are sufficient, constitute a new and independent cause of action without reference to the facts alleged in the original pleading. In such case relief should be had by a new and independent action. Following the rule in Swedish National Bank v. Dickinson, 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285."

It is further settled law in Oklahoma that under and by virtue of Section 551 O. S. 1931, the law of a case is stated in the syllabus: (See *Corbin* v. *Wilkinson,* 175 Okl. 247,

52 P. (2d) 45; and *Loffland Bros. Co.* v. *Velvin,* 152 Okl. 83, 3 P. (2d) 855.)

The court, in the *Anadarko* case having in the syllabus followed the rule announced in *Swedish National Bank* v. *Dickinson,* 6 N. D. 222, 69 N. W. 455, the rule announced therein became the law of the case in Oklahoma, and the syllabi of said case read as follows:

1. "The facts embodied in a supplemental complaint under the Code must relate to the cause of action set forth in the original complaint, and must be in aid thereof.

2. "It is not proper to bring into a case, by supplemental complaint, new facts which have arisen since the action was commenced, and which by themselves constitute a new and independent cause of action, without reference to the facts alleged in the original pleading.

3. "Accordingly, held, that when pending an action upon notes, judgment thereon was recovered in another state, the plaintiff could not file a supplemental complaint alleging recovery of such judgment, but that the rendition thereof constituted a bar to the further prosecution of the action."

The above cases have never been overruled or modified. In *Adams* v. *Webb,* 104 Okla. 180, 230 P. 678, the court stated:

> "Whether such a pleading is amendatory or supplemental must be determined from its substance rather than from the title given it by the pleader. State ex rel. Morris v. City of Muskogee, 70 Okl. 19, 172 P. 796."

The facts in said cases were distinguishable, but in construing the facts therein, the court followed the rule announced in the *Anadarko* case, stating as follows:

> "* * * Clearly, it was the intention of plaintiff in filing the pleading, which he did file, to aid and strengthen the cause of action set forth in his original petition,

> by stating facts arising since the commencement of the action. This constitutes it a supplemental petition. National Bank v. First National Bank, 39 Okl. 225, 134 P. 866."

The language in the *National Bank of Anadarko* case is clear, definite and certain and subject to no other construction than that when an action is pending upon a promissory note, and the judgment has been rendered on said note in another state court, there is thereby created a separate cause of action upon the foreign judgment which must be prosecuted as such, and cannot form the basis of a prosecution of an action by supplemental petition.

This same rule was announced in the Supreme Court of Kansas from which Oklahoma took its statute in *Austin* v. *Jones*, 47 Kan. 565, 28 P. 612, which was decided before Oklahoma adopted the statute, wherein the court stated as follows:

> "Besides, the plaintiff in this case did not attempt by his supplemental petition to set up a *new, separate* and *independent* cause of action, but simply attempted to set forth facts which took place subsequently to the commencement of the action, for the purpose of perfecting or making better his original cause of action."

The above cases are conclusive: That an action upon a foreign judgment is a separate and distinct cause of action and cannot be prosecuted by supplemental petition to an original action based upon a promissory note, although the note formed the basis of the foreign judgment.

It is the settled law of Oklahoma that where a plaintiff files a pleading, whether denominated an amended or a supplemental petition, that is complete within itself and states a cause of action and does not refer to or adopt the original petition, said original petition is superseded and is no part of the record unless introduced in evidence.

> *Lane* v. *Choctaw O. & G. Co.*, 19 Okl. 324, 91 Pac. 883;
> *Territory* v. *Woolsey*, 35 Okl. 545, 130 Pac. 934;

Garr Scott & Co. v. *Rogers,* 46 Okl. 67, 148 Pac. 161;
Lausten v. *Lausten,* 55 Okl. 518, 154 Pac. 1182;
Dawkins v. *Peoples Bank & Trust Co.,* 117 Okl. 181, 245 Pac. 594;
Seekatz v. *Brandenburg,* 150 Okl. 55, 300 Pac. 678;
Scott v. *Price,* 123 Okl. 172, 247 Pac. 103;
Busse v. *Busse,* 161 Okl. 159, 17 Pac. (2d) 511;
Cushing Gasoline Co. v. *Hutchins,* 93 Okl. 13, 219 Pac. 408.

In *Busse* v. *Busse, supra,* the Supreme Court of Oklahoma said:

> "Where an amended petition does not refer to or adopt the original petition, the original petition is superseded and is no part of the record, unless introduced in evidence."

(D)—The Supreme Court of Oklahoma Erred in Denying to Petitioner the Equal Protection of the Law, Thereby Holding in Effect that the Law Means One Thing for Some Persons and Another for Others Similarly Situated.

It is plain under the uncontroverted facts that the practical effect of the judgment of the Supreme Court of Oklahoma is to deprive the petitioner of the benefits of the settled law of the state that jurisdiction of an action on a foreign judgment cannot be conferred upon the court by incorporating said essential facts in a pleading and denominating the same a supplemental petition and filing the same in an action on a promissory note, which law is applicable to others similarly situated under the same identical facts. This is the settled law of the state as applied to certain litigants. That as to this petitioner the court totally disregards and evades the substantive law upon which jurisdiction is conferred upon the court and denies to him the benefits of the settled law of the state. This, under the holding of the former decisions of this court, constitutes a denial of the equal protection of the law under the Four-

teenth Amendment to the Constitution of the United States. This court recognized that rule in *Great Northern Ry. Co.* v. *Sunburst Oil & Refg. Co.*, 287 U. S. 358, 53 S. C. 145, wherein the court stated:

> "The second is a challenge to the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others. This latter objection the petitioner could not make in advance of the event."

We do find where this honorable court has in many instances applied the same principle to the executive and legislative branches and, in those instances, has announced the principle that the discrimination must be intentional.

In *Louisville & N. R. Co.* v. *Bosworth*, 230 Fed. 191, affirmed as to the Federal Question in 244 U. S. 522, 37 S. Ct. 683, 61 L. Ed. 129, the court said:

> "Certainly an intentional discrimination is forbidden."

In *Yick Wo* v. *Hopkins*, 118 U. S. 356 it is said:

> "Though a law be fair upon its face and impartial in appearance, yet if it is administered by public authority with an evil eye and an unequal hand, so as to practically make illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the protection of the Constitution."

In *Buchannan* v. *Warley*, 245 U. S. 60, 38 S. Ct. 16, the court said:

> "While a principal purpose of the latter amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminary legislation by the state."

In *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 515, the court said:

> "The purpose of the clause in respect to equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances."

In *Sunday Lake Iron Co.* v. *Wakefield, Tp.,* 247 U. S. 350, the court said:

> "The purpose of the equal protection clause of the Fourteenth amendment is to secure to every person within the states jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

In *Truax* v. *Corrigan, et al,* 257 U. S. 312, the court said:

> "* * * this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the denying of it to another under similar circumstances and in the same territorial jurisdiction."

The petitioner asserts under the uncontroverted facts that an intentional discrimination appears on the face of the opinion, making it obvious that the Federal question was in issue, was decided against the claim of Federal right, and that the decision of the question was essential to the opinion rendered.

Chambers v. *Baltimore & O. R. Co.,* 207 U. S. 142;
Cumberland Coal Co. v. *Board,* 284 U. S. 23;
Great Northern Ry. Co. v. *Sunburst Oil & Refg. Co.,* 287 U. S. 358;
Saunders v. *Shaw,* 244 U. S. 317.

The petitioner could not anticipate in advance of that event that the Supreme Court of Oklahoma would render an opinion, the effect of which is that the law is held to be one thing for him and another thing for others.

Brinkerhoff-Farris Trust & Savings Co. v. *Hill*, 281 U. S. 673;
Missouri Ex Rel Missouri Ins. Co. v. *Gehner*, 281 U. S. 313;
Great Northern Ry. Co. v. *Sunburst Oil & Refg. Co.*, 287 U. S. 358.

(E)—Writ of Certiorari Should Issue.

From the records in this case it is clear that the District Court is proceeding with the sanction of the Supreme Court of Oklahoma in the exercise of an assumed jurisdiction not vested in it by the settled law of the state, and is denying to petitioner the equal protection of the settled law of the state announced by the former decisions of said Supreme Court which have not been and are not reversed, overruled or modified.

The cases heretofore cited disclose the opinion of the Supreme Court of Oklahoma permits and authorizes the jurisdiction of a cause of action against this petitioner by a pleading that states a cause of action based on a foreign judgment filed in a pending proceeding upon a promissory note, while as to other persons similarly situated under identical facts, the court holds that such a proceeding is unauthorized and jurisdiction is not conferred thereby.

Because of the grave consequences that will result if the courts of the state are permitted to administer the laws in a manner that they do not apply to all litigants equally, it is respectfully submitted that the writ of certiorari should issue under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1926 (28 U. S. C. A. 344b) and under Paragraph 5 (a) of Rule 38, and the case of *Great Northern Ry. Co.* v. *Sunburst Oil & Refg. Co.*, and other cases *supra*.

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No. 271

In the Supreme Court of the United States

October Term, 1941.

J. T. SMITH, *Petitioner,*

vs.

THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA, *Respondent.*

Response to Petition for Writ of Certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1941.

No. 271

J. T. SMITH, *Petitioner,*

vs.

THE FOURTH NATIONAL BANK OF TULSA, OKLAHOMA, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF *CERTIORARI.*

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement.

This application appears to be another attempt on the part of the petitioner to delay or evade the payment of an honest debt.

On May 5, 1931, John T. Smith, an attorney of Sapulpa, Oklahoma, made, executed and delivered to The Fourth National Bank of Tulsa his promissory note for the sum of $9,800.00, due August 3, 1931. Smith received the money on this note and gave a mortgage on certain real estate in Creek and other counties in Oklahoma, and in Chautauqua County, Kansas, to secure the payment thereof. The bank was lenient and extended time of payment until May 22, 1933, at which time Smith, the maker of the note, had paid